UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER BRADLEY,

Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Defendants.

Civil Action No. 1:16-CV-00346 (RBW)

Judge: Reggie B. Walton

DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PERTAINING TO DEFENDANTS' AFFIRMATIVE DEFENSES

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INTRODUCTION

The National Collegiate Athletic Association ("the NCAA"), by and through its counsel, Orrick, Herrington & Sutcliffe LLP, hereby submits the following Memorandum of Points and Authorities in Opposition to Plaintiff's ("Plaintiff" or "Ms. Bradley") Motion for Summary Judgment Pertaining to Defendants' Affirmative Defenses, ECF No. 86-2 (hereinafter, "Plaintiff's Motion").

This Court rightfully dismissed all of Plaintiff's legal claims against the NCAA on earlier dispositive motion practice, except one – negligence. After discovery, the NCAA filed a motion for summary judgment seeking dismissal of the negligence claim. Plaintiff then filed an omnibus motion for summary judgment against all the Defendants, requesting the court grant summary judgment, dismissing certain affirmative defenses.

Plaintiff relies on a new theory of her case in support of this motion. According to Plaintiff, this case is "the quintessential failure to diagnose case," and what "is truly at issue," is that had Plaintiff's concussion "been treated appropriately, [her] symptoms more likely than not would have resolved." Pl.'s Motion at 11, ECF No. 86-2 (emphasis added). But this Court has already considered this claim as it pertains to the NCAA, and properly dismissed it back in April 2017. As the Court rightly found, the NCAA is not "an entity licensed or otherwise authorized under District law to provide healthcare services," including the diagnosis and treatment of student-athletes; and the NCAA has no "right to *control* or *direct* the healthcare providers who treated the plaintiff at [her] University." *Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F. Supp. 3d 149, 173-74 (D.D.C. 2017) (emphasis added). Indeed, Plaintiff's new theory of the case only demonstrates

exactly why the NCAA is not a proper party to this Action and supports the NCAA's motion for summary judgment, seeking dismissal of her claim for negligence. *See* ECF No. 87.[1]

Even operating under Plaintiff's new theory, however, she fails to meet her burden as the party moving for summary judgment. Moreover, Plaintiff cannot establish that there is no genuine dispute as to any material fact regarding the NCAA's affirmative defenses. The NCAA's motion for summary judgment should be granted, dismissing the NCAA from this case entirely. But if it is not, the NCAA's affirmative defenses should not be dismissed as Plaintiff requests.

PROCEDURAL HISTORY

On February 23, 2016, Plaintiff filed an Amended Complaint against several defendants, including the NCAA. *See* Pl.'s Am. Complaint, ECF No. 1-5 (hereinafter "Pl.'s Am. Complaint"). Plaintiff's Amended Complaint contained six claims against the NCAA, including negligence, gross negligence, negligent infliction of emotional distress, fraudulent misrepresentation, breach of contract, and medical malpractice. *See id.* at ¶¶ 137-56, 169-88, 195-205. On April 12, 2017, this Court dismissed all claims against the NCAA, except for Plaintiff's negligence claim; finding that Plaintiff failed to plead facts sufficient to support her claims for gross negligence, negligent infliction of emotional distress, fraudulent misrepresentation, breach of contract, and medical malpractice. *See Bradley*, 249 F. Supp. 3d at 167-174.

Plaintiff, through her one remaining claim of negligence against the NCAA, alleges that "Defendant NCAA undertook and assumed a duty to protect the physical and mental well-being of all student-athletes participating in intercollegiate sports, including Jennifer Bradley." Pl.'s

[1] The NCAA's Motion for Summary Judgment Regarding Negligence is based, in part, on the fact that a "defendant is liable to a plaintiff for negligence *only* when the defendant owes the plaintiff some duty of care." Def.'s Br. at 9, ECF No. 87. Although Plaintiff now argues that this is "the quintessential *failure to diagnose* case," it is evident that the NCAA owed no such duty to *diagnose* and/or *treat* Plaintiff after her alleged injury. Pl.'s Motion at 11, ECF No. 86-2 (emphasis added); *see cf. Bradley*, 249 F. Supp. 3d at 173-74.

Am. Complaint ¶ 138. Plaintiff further alleges that Defendant NCAA failed in its duties in the following ways:

a) Failing to enforce the NCAA Constitution, By-laws and the Handbook;
b) Failing to ensure that the coaches, athletic trainers and graduate assistants were educated about the signs, symptoms and risks of concussions, second-impact syndrome, and post-concussive syndrome;
c) Failing to enforce the Plan;
d) Failing to provide Plaintiff and her teammates with a safe environment;
e) Failing to protect and enhance the physical and educational well-being of Plaintiff and other student-athletes;
f) Failing to maintain institutional control over Defendant AU, the coaches, athletic trainers, and the athletic director;
g) Failing to implement appropriate safety procedures and policies regarding concussion prevention;
h) Failing to implement appropriate safety procedures and policies regarding care, treatment, and monitoring of student-athletes suffering from concussions, concussion symptoms, and post-concussive symptoms;
i) Failing to implement appropriate oversight over its member institutions in their implementation of Concussion Management Plans;
j) Failing to implement appropriate requirements over its member institutions in their hiring and training of appropriate medical personnel;
k) Failing to provide appropriate guidance to its member institutions on concussion management;
l) Failing to provide its student-athletes with reasonable protection to their physical and mental well-being;
m) Failing to safeguarding [sic] its student-athletes from preventable concussion and post-concussion injuries; and
n) Being otherwise negligent.

See Pl.'s Am. Complaint ¶ 142.

On May 12, 2017, the NCAA filed its Answer in response to Plaintiff's Complaint. *See* NCAA's Answer and Affirmative Defenses to Pl.'s Am. Complaint, ECF No. 42 (hereinafter "NCAA's Answer"). Contained therein were the following Affirmative Defenses: (1) failure to state a claim upon which relief can be granted; (2) Plaintiff's contributory negligence;

(3) Plaintiff's assumption of the risks inherent in the sport she chose to play; (4) the contact sports exception to the ordinary standard of care; (5) Plaintiff's failure to mitigate damages; (6) the statute of limitations; and (7) estoppel and/or waiver. *See* NCAA's Answer at 13-14.

On January 16, 2019, Plaintiff filed her summary judgment motion, which not only seeks to dismiss the NCAA's affirmative defenses, with prejudice, but also seeks to shift the Court's focus to solely the post-concussion allegations in the Complaint. *See* Pl.'s Motion, ECF No. 86-2. According to Plaintiff, this case "is not about the fact that she suffered a concussion but rather is about the negligent care and treatment that was provided to her *after* sustaining the concussion." Pl.'s Motion at 5 (emphasis added).

Plaintiff's Motion introduces a new theory, which conflates the affirmative defenses pled by each Defendant in what appears to be a veiled attempt to resuscitate Plaintiff's medical malpractice claim against the NCAA. Nonetheless, the Court has already ruled on this issue; finding that the NCAA has no "right to control or direct" the healthcare providers who treated Ms. Bradley. *Bradley*, 249 F. Supp. 3d at 173-74. Notably, in rejecting Plaintiff's medical malpractice claim against the NCAA, this Court reasoned that "the NCAA, through the Sports Medicine Handbook and its policies, *only provides guidance for the consideration of its member institutions* and does not establish a standard of care, instead deferring to the member institutions the responsibility of developing sports medicine policies for the care and treatment of their student-athletes." *Bradley*, 249 F. Supp. 3d at 174 (emphasis added).

FACTUAL BACKGROUND

I. The NCAA's Governance Structure

The NCAA is a member-led, voluntary association comprised of more than 1,100 member institutions. *See* Combined Statement of Undisputed Material Facts ("SUMF") ¶ 25. Like all member-led associations, it is the NCAA's members who determine the rules of the Association

and the scope of the Association's duties and authority. *See* SUMF ¶ 26. The NCAA does not control its members, or wield authority and responsibility over its members' activities, except with respect to those areas where the members have specifically delegated those roles to the NCAA. *See* SUMF ¶ 27.

A. Determining Appropriate Care & Treatment

The NCAA's governing documents, including the 2010-2011 NCAA Sports Medicine Handbook (the "Handbook") and the 2011-2012 NCAA Division I Manual, demonstrate that the oversight and control of a student-athlete's well-being is not an area that has been delegated to the NCAA. *See* SUMF ¶ 28. Rather, they provide that member institutions, *not* the NCAA, retain nearly all of the control and oversight of intercollegiate sports-related activities, and make it clear that each member institution, *not* the NCAA, is responsible for, and in control of, its intercollegiate athletics program, including the health and safety of its participating student-athletes. *See* SUMF ¶ 29. According to the Handbook, the "determination of the appropriate care and treatment of student-athletes must be based on the clinical judgment of the institution's team physician or athletic health care team that is consistent with sound principles of sports medicine care." SUMF ¶ 30.

B. Concussion Management

On August 12, 2010, the NCAA Division I Board of Directors, comprised entirely of conference and university representatives, adopted legislative updates that were included in the NCAA Division I Manual to require that all active member institutions "have a concussion management plan for its student-athletes." SUMF ¶ 31. The plan was required to include, but not be limited to, the following:

> (a) An annual process that ensures student-athletes are educated about the signs and symptoms of concussions. Student-athletes must acknowledge that they have received information about the signs and symptoms of concussions and that they have a responsibility to report concussion-related injuries and illnesses to a medical staff member;

> (b) A process that ensures a student-athlete who exhibits signs, symptoms or behaviors consistent with a concussion shall be removed from athletics activities (e.g., competition, practice, conditioning sessions) and evaluated by a medical staff member (e.g., sports medicine staff, team physician) with experience in the evaluation and management of concussions;
>
> (c) A policy that precludes a student-athlete diagnosed with a concussion from returning to athletics activity (e.g., competition, practice, conditioning sessions) for at least the remainder of that calendar day; and
>
> (d) A policy that requires medical clearance for a student-athlete diagnosed with a concussion to return to athletics activity (e.g., competition, practice, conditioning sessions) as determined by a physician (e.g., team physician) or the physician's designee.

SUMF ¶ 32.

II. Plaintiff's Education on the Signs & Symptoms of Concussions

Plaintiff played field hockey for American University ("AU") voluntarily and with full knowledge of the risks associated with playing the sport. *See* SUMF ¶ 2. According to Plaintiff, "[f]ield hockey is a … physical sport." SUMF ¶ 34. During an AU pre-season compliance meeting, Plaintiff "signed concussion papers," which set forth the risks associated with concussions, and Plaintiff admits that she was informed that "if you're experiencing certain [concussion] symptoms to tell your trainer." SUMF ¶ 35.

Moreover, on July 1, 2009, Plaintiff signed an "Acknowledgement of Risk" agreement with AU, where she acknowledged that she is aware of "the risks of injury inherent in athletic activities"; the risks in playing field hockey, in particular; and "that such risks may include death, paralysis and other serious permanent bodily injury." SUMF ¶ 36. Plaintiff acknowledged that "participation in intercollegiate athletics includes the risk of injury, including, but not limited to serious permanent injury and death" and that "such injuries may occur in the absence of negligence." SUMF ¶ 37. Plaintiff also signed AU's "Concussion Statement," which reads: "I understand that participation in intercollegiate athletics includes the risk of injury, including but

not limited to serious permanent injury and death. I further understand that there is a possibility that participation in my sport may result in a head injury or concussion. I have been provided with education on head injuries and understand the importance of ***immediately*** reporting symptoms of a head injury/concussion to the Sports Medicine Staff." SUMF ¶ 38 (emphasis added).

And, of note, Plaintiff testified that she suffered a previous concussion when she "was around the age of eight" after falling off a bicycle. SUMF ¶ 39.

III. Plaintiff's Alleged Injury and Diagnosis

On September 23, 2011, Ms. Bradley allegedly suffered a concussion resulting from a collision during a field hockey game against the University of Richmond ("Richmond"). *See* SUMF ¶¶ 3-4. Plaintiff was a member of AU's Division I field hockey team at the time of her alleged injury. *See* SUMF ¶ 2. Despite experiencing symptoms, Plaintiff did not immediately report her injury to anyone on AU's sports medicine staff or any other medical professional. *See* SUMF ¶¶ 3, 5.

On September 25, 2011, Plaintiff played another game against Boston College ("Boston"), and still did not have any conversations with the AU trainers or coaching staff before or after the Boston game regarding her alleged injury. *See* SUMF ¶ 40. On October 1, 2011, Ms. Bradley and her team played Lehigh University ("Lehigh"). *See* SUMF ¶ 41. According to Plaintiff, it was after the October 1st Lehigh game that she finally had a discussion with Sarah Thorn and Jenna Earls from AU's training staff. *See* SUMF ¶ 5. Plaintiff also discussed her symptoms with Steve Jennings, the AU field hockey head coach. *See* SUMF ¶ 5. By October 1, 2011, Plaintiff had been purportedly experiencing symptoms of her alleged concussion for about nine days. *See* SUMF ¶¶ 3-5.

Despite her symptoms, Plaintiff participated, and started in, an October 2, 2011 game against Temple University ("Temple"). *See* SUMF ¶ 42. On October 3, 2011, Plaintiff sent an

email to Ms. Earls, where Plaintiff noted, among other things, that when she is playing, she feels "dizzy and unfocused" and that it is "hard to concentrate on tactical things like the press." SUMF ¶ 43. Ms. Bradley's October 3, 2011 email was a clarification of the way Plaintiff described how she was feeling on October 1, and an explanation of the symptoms she was experiencing "for over a week" prior. SUMF ¶ 44. As such, Plaintiff participated in AU's October 2, 2011 Temple game, despite feeling "dizzy and unfocused," among other things. SUMF ¶ 45.

Ms. Earls, Plaintiff's field hockey trainer, scheduled an appointment for Plaintiff to see Dr. Aaron Williams on October 5, 2011. *See* SUMF ¶ 15. Dr. Williams informed Plaintiff that she did *not* have a concussion. *See* SUMF ¶ 15. According to Plaintiff, upon examination, Dr. Williams did not say she could no longer play field hockey, but Dr. Williams may have asked her to sit out for the next two practices. *See* SUMF ¶ 46.

On October 16, 2011, Dr. Williams suggested that Plaintiff receive a second opinion. *See* SUMF ¶ 47. Accordingly, on October 20, 2011, Plaintiff visited Dr. Michael Morris, an ENT specialist. *See* SUMF ¶ 48. Dr. Morris diagnosed Plaintiff with a brain virus and vertigo. SUMF ¶ 49. Neither Dr. Williams nor Dr. Morris were employed by or affiliated with the NCAA at the time of Plaintiff's alleged injury. *See* SUMF ¶ 50.

After Dr. Morris's diagnosis, Plaintiff continued to participate in field hockey practices and games despite her symptoms, sitting out only intermittently. *See* SUMF ¶ 51. From October 21, 2011 to November 4, 2011, Ms. Bradley played in games against Bucknell University ("Bucknell"), Georgetown University ("Georgetown"), and Lafayette University ("Lafayette"); in three of which she played as a starter. *See* SUMF ¶¶ 18-19, 21-22.

From November 2011 through February 2012, Plaintiff met with various medical professionals until she was eventually diagnosed with a concussion sometime during the spring of

2012. *See* SUMF ¶ 52. Although Plaintiff does not recall exactly when she was diagnosed with a concussion, she is certain that she was diagnosed by neurologist, Dr. Puneet Singh. *See* SUMF ¶ 24.

On June 6, 2018, Plaintiff's expert, Dr. Robert Cantu, testified that an athlete "should be held out from the time that [a] concussion is recognized," and "the sooner it's recognized, the better." SUMF ¶ 53. Dr. Cantu stated that the NCAA's 2010 Handbook was "very appropriate," because it required that "anybody suspected of a concussion or diagnosed with a concussion needed to be immediately removed from a contest [i.e., practices or games]." SUMF ¶ 54. According to Dr. Cantu, "the most criticism for this case" belonged not to the NCAA, but to Dr. Williams, who treated Ms. Bradley after her alleged injury, and found that she did not have a concussion. SUMF ¶ 55.

Dr. Cantu also opined that "all of [Ms. Bradley's] subsequent practices and games that she played after [September 23, 2011] probably contributed to the very prolonged post-concussion syndrome that she ultimately sustained." SUMF ¶ 56. Dr. Cantu specifically noted that the four days of activity between October 1, 2011 and October 5, 2011, "were part of the contribution." SUMF ¶ 57. October 1-5, 2011 are the days spanning between the time Plaintiff told her AU training staff about her symptoms and when she visited with Dr. Williams regarding her head injury. Dr. Cantu explained his opinion as follows: "What I was trying to say was that it contributed, so that is part of the contribution. So, yes, I would say those four days were part of the contribution. I can't tell you a percentage, but definitely I would *not* say that those four days were immune from contributing." SUMF ¶ 58.

According to Plaintiff, if her doctors informed her that she was not cleared to play, she would not have played. *See* SUMF ¶ 60. And, she admits that her head coach would have followed the doctor's orders on her readiness to play. *See* SUMF ¶ 61.

IV. Plaintiff's Failure to Communicate with the NCAA Regarding Her Injuries

At no point did Ms. Bradley or her physicians communicate with the NCAA about Plaintiff's symptoms, injuries, medical history, or otherwise; and Plaintiff made no attempt to visit the NCAA's website in order to contact the NCAA or find the NCAA's contact information. *See* SUMF ¶ 62. During Plaintiff's November 21, 2017 deposition, Ms. Bradley admitted that she never called anyone at the NCAA and did not talk to anyone known to be affiliated with the NCAA about her alleged injury or any of her symptoms. *See* SUMF ¶ 63.

According to Plaintiff, she trusted her trainers to take care of her. *See* SUMF ¶ 64. Despite Plaintiff's allegations, she testified that she did not assume the NCAA owed her a legal duty of care when things went wrong, but that this duty, instead, was that of her "trainer, [ ] coaches, and if it got any worse, the doctors." SUMF ¶ 65. Plaintiff concedes that she does not know what the NCAA could have done differently. *See* SUMF ¶ 66.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, Plaintiff is entitled to summary judgment, if Plaintiff can show that there is "no genuine dispute as to any material fact," and that she is entitled to "judgment as a matter of law." FED. R. CIV. P. 56. However, the moving party is entitled to judgment as a matter of law *only* if the nonmoving party "fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All reasonable inferences the Court draws from the evidence should be viewed in a light most favorable to the non-moving party. *See e.g., Thompson v. Fathom Creative, Inc.*, 626 F. Supp. 2d 48, 54 (D.D.C. 2009).

On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007) (citation omitted). When a motion for summary judgment is under consideration, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted).

LEGAL ARGUMENT

I. The NCAA Owed Plaintiff No Duty to Diagnose or Treat Her Alleged Injuries and This Claim Was Previously Dismissed

Plaintiff attempts to salvage her claim in the face of dismissal by alleging that this is truly a medical malpractice claim. According to Plaintiff, this is "the quintessential failure to diagnose case," and what "is truly at issue," is that had Plaintiff's concussion "been treated appropriately, [her] symptoms more likely than not would have resolved." Pl.'s Motion at 11, ECF No. 86-2. In other words, Plaintiff's Motion for Summary Judgment Pertaining to Defendants' Affirmative Defenses has now limited this action solely to the events that occurred *after* Ms. Bradley's alleged September 23, 2011 injury, *i.e.*, events concerning Ms. Bradley's *diagnosis* and *treatment*, and as such, has transformed this case into one about medical malpractice.

Plaintiff argues that this case "is not about the fact that she suffered a concussion but rather is about the *negligent care and treatment* that was provided to her *after* sustaining the concussion." Pl.'s Motion at 5, ECF No. 86-2 (emphasis added). The NCAA, however, is not "an entity licensed or otherwise authorized under District law to provide healthcare services," including the diagnosis and treatment of student-athletes, and the NCAA has no "right to control or direct the healthcare providers who treated the plaintiff at [her] University." *Bradley*, 249 F. Supp. 3d at 173-74. Moreover, not one single allegation that Plaintiff raises against the NCAA regarding negligence—the only remaining claim against the NCAA—concerns the care and treatment that Plaintiff

received after her alleged field hockey injury. Plaintiff's argument only further supports the NCAA's January 16, 2019 Motion for Summary Judgment Regarding Negligence, seeking to dismiss Plaintiff's negligence claim, *with prejudice*. *See* ECF No. 87.

The NCAA's January 16, 2019 Motion for Summary Judgment is predicated primarily on the fact that, under District of Columbia law, "[a] defendant is liable to a plaintiff for negligence *only* when the defendant owes the plaintiff some duty of care." *Bradley*, 249 F. Supp. 3d at 175 (quoting *Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873, 888 (D.C. 2011) (emphasis added)). During Plaintiff's November 21, 2017 deposition, Ms. Bradley admitted that she never called anyone at the NCAA and did not talk to anyone known to be affiliated with the NCAA about her alleged injury or any of her symptoms. *See* SUMF ¶ 63. Additionally, at no point did Plaintiff or her physicians communicate with the NCAA about Plaintiff's symptoms, injuries, or otherwise. *See* SUMF ¶ 62. Plaintiff also made no attempt to visit the NCAA's website in order to contact the NCAA or find the NCAA's contact information. *See* SUMF ¶ 62. Despite Plaintiff's allegations, she testified that she did not assume the NCAA owed her a legal duty of care when things went wrong, but that this duty, instead, was that of her "trainer, [ ] coaches, and if it got any worse, the doctors." SUMF ¶ 65.

In fact, it was Dr. Williams, not the NCAA, that informed Plaintiff that she did *not* have a concussion. *See* SUMF ¶ 15. Plaintiff's diagnosis and treatment was the responsibility of Dr. Williams and the variety of other healthcare professionals with whom Ms. Bradley visited and consulted after her injury. *See* SUMF ¶ 52. According to Plaintiff's expert, Dr. Robert Cantu, "the most criticism for this case" belonged *not* to the NCAA, but to Dr. Williams, who treated Ms. Bradley after her alleged injury, and found that she did not have a concussion. SUMF ¶ 55. Plaintiff in her Motion even admits this when she states that "Plaintiff clearly described her

complaints to her coaches, trainers, and medical personnel, including Dr. Williams, whose responsibility it was to diagnose her injury and to refer her to a higher level of care if he was incapable of treating her." Pl.'s Motion at 10, ECF No. 86-2. As Plaintiff herself concedes, the NCAA did not have any knowledge of Plaintiff's injury and, therefore, did not have the ability or any legal duty to diagnose or treat Ms. Bradley.

As the Court correctly found, the NCAA has no "right to *control* or *direct* the healthcare providers who treated the plaintiff at [her] University." *See e.g. Bradley*, 249 F. Supp. at 173-74 (emphasis added). The NCAA played absolutely no role in Ms. Bradley's diagnoses and/or treatment. In light of Plaintiff's latest argument that this "is the quintessential failure to diagnose case" and this Court's rulings on the NCAA's Motion to Dismiss, this Court should dismiss the NCAA from this action entirely.

II. The NCAA's Affirmative Defenses Are Supported by the Record in this Case

As a preliminary matter, Plaintiff's "omnibus motion" against all Defendants fails to specify her arguments against the NCAA. In other words, Plaintiff fails to differentiate between each Defendant, and instead, repeatedly refers to all six Defendants as a single collective, and generalizes her claims that Defendants have presented insufficient evidence concerning their affirmative defenses.[2] *See* Pl.'s Motion at 7, 9, 11-12, 14-15, 17, ECF No. 86-2. Plaintiff's generalized arguments do not satisfy her burden under Rule 56. Moreover, notwithstanding Plaintiff's "one-argument-fits-all" approach, Plaintiff cannot establish that no genuine issues of material fact exist concerning the NCAA's affirmative defenses, particularly with respect to

[2] For example, the following arguments are made in Plaintiff's Motion: (1) "[I]t appears that *Defendants* are attempting to claim that by playing field hockey, Ms. Bradley assumed the risk of suffering a concussion"; (2) "*Defendants*, however, do not in any way establish that Plaintiff had a clear understanding of post-concussion syndrome"; (3) "*Defendants* have designated the following medical expert witnesses in this matter"; (4) "*Defendants* have failed to proffer evidence to establish that Plaintiff was contributorily negligent . . ."; and (5) "*Defendants* have simply failed to proffer any evidence to establish that Ms. Bradley breached a duty to report." Pl.'s Motion at 8-9, 12, 15, 17, ECF. No. 86-2 (emphasis added).

assumption of the risk, contributory negligence, and failure to mitigate damages.[3] *See e.g.*, *Celotex Corp.*, 477 U.S. at 323, 325.

A. Plaintiff Assumed the Risk of Playing Field Hockey

Assumption of the risk has two elements: (1) actual knowledge and comprehension of the potential dangers; and (2) voluntary exposure to that danger. *See e.g.*, *Novak v. Capital Mgmt. & Dev. Corp.*, 570 F.3d 305, 313-314 (D.D.C. 2009) (citing *Morrison v. MacNamara*, 407 A.2d 555, 566-568 (D.C. 1979)); *see also Maalouf v. Swiss Confederation*, 208 F. Supp. 2d 31, 42 (D.D.C. 2002) (Because analyzing assumption of the risk is "heavily fact-based," the Court should grant summary judgment *only* "if no real dispute exists as to the plaintiff's awareness of the relevant danger.").

Ms. Bradley had actual knowledge of the potential dangers of playing field hockey, and voluntarily played field hockey for AU nonetheless. Further, Ms. Bradley acknowledged that, "[f]ield hockey is a . . . physical sport." SUMF ¶ 34. During an AU pre-season compliance meeting, Plaintiff "signed concussion papers," which set forth the risks associated with concussions, and Ms. Bradley admits that she was informed that "if you're experiencing certain [concussion] symptoms to tell your trainer." SUMF ¶ 35. On July 1, 2009, Plaintiff signed an "Acknowledgement of Risk" agreement with AU, where she acknowledged that she is aware of "the risks of injury inherent in athletic activities"; the risks in playing field hockey, in particular; and "that such risks may include death, paralysis and other serious permanent bodily injury." SUMF ¶ 36.

[3] Upon careful consideration of the entire record, the NCAA hereby withdraws the following affirmative defenses: No. 4, concerning the "contract sports exception to the ordinary standard of care"; No. 6, concerning "the applicable statute of limitations and/or laches"; and No. 7, concerning "estoppel." Def.'s Answer, ECF No. 42. The NCAA's remaining affirmative defenses—No. 2, concerning "contributory negligence of the Plaintiff"; No. 3, concerning assumption of the risk; and No. 5, concerning mitigation of damages—are all fully supported by the record in this case and should not be dismissed. *Id.*

Plaintiff also signed AU's "Concussion Statement," which reads: "I understand that participation in intercollegiate athletics includes the risk of injury, including but not limited to serious permanent injury and death. I further understand that there is a possibility that participation in my sport may result in a head injury or concussion. I have been provided with education on head injuries and understand the importance of ***immediately*** reporting symptoms of a head injury/concussion to the Sports Medicine Staff." SUMF ¶ 38 (emphasis added).

Under District of Columbia law, a plaintiff's "voluntary decision to proceed in the face of [a] known risk 'relieves the defendant of any duty which he otherwise owed the plaintiff.'" *Krombein v. Gali Serv. Indus.*, 317 F. Supp. 2d 14, 20 (D.D.C. 2004) (citing *Sinai v. Polinger Co.*, 498 A.2d 520, 524 (D.C. 1985)). Based on the above, it is evident that Plaintiff knowingly assumed the risks associated with playing field hockey for a Division I institution, like AU. Although, Plaintiff now argues that the Court's focus should be on a purported "failure to diagnose," the NCAA's affirmative defenses were prepared in response to Plaintiff's Amended Complaint, and *not* Plaintiff's Motion. Pl.'s Motion at 11, ECF No. 86-2; *see cf.* Pl.'s Am. Complaint ¶¶ 137-146, ECF No. 1-5. Plaintiff's Amended Complaint and her specific allegations against the NCAA were focused on *pre-injury* duties related to preventing concussions, as well as *post-injury* events. *See infra* pp. 1-4. Plaintiff is not permitted to dictate how and when a defendant's affirmative defenses should be applied. If Plaintiff wants the NCAA's affirmative defenses to apply only to post-injury activities, that is fine, but the NCAA was not involved in Plaintiff's post-injury activities, and accordingly Ms. Bradley should dismiss her claims against the NCAA.

At minimum, as a student with "an above average intellect," a wealth of success and experience in field hockey and one that had suffered from a previous concussion prior to her

alleged September 2011 injury, Plaintiff was not only aware of concussions, but also of their long-term effects. Pl.'s Motion at 9, ECF No. 86-2; *see also* SUMF ¶ 36. Plaintiff even admits that her knowledge regarding concussion is undisputed.[4] Drawing all justifiable inferences in the NCAA's favor, the NCAA has clearly established sufficient facts to show that Plaintiff assumed the risk of playing field hockey.

B. Plaintiff Was Contributorily Negligent in Her Actions

"[T]he District of Columbia recognizes contributory negligence as a defense to negligence claims . . . ." *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, 786 F. Supp. 2d 240, 311 (D.D.C. 2011) (J. Walton). "To assert a defense of contributory negligence, the defendant 'must establish by a preponderance of the evidence, that the plaintiff failed to exercise reasonable care, and that this failure was a substantial factor in causing the alleged damage or injury.'" *Id.* (citation omitted). From the moment when Plaintiff initially suffered her head injury through the day when Dr. Puneet Singh diagnosed her, Plaintiff took a number of actions that demonstrate her failure to exercise reasonable care. These failures were substantial factors in causing the alleged damage or injury.

First, Plaintiff sustained her alleged injury on September 23, 2011, but failed to report her symptoms to any AU athletic trainers or staff until on or around October 1 or 2, 2011—over a week after her alleged head injury. *See* SUMF ¶¶ 3-4, 5. Prior to informing the AU athletic staff on October 1 or 2, Plaintiff participated in AU's September 25, 2011 game against Boston. *See* SUMF ¶ 40. According to Plaintiff, she failed to inform anyone from AU's training staff about

[4] The NCAA disputes Plaintiff's argument that Ms. Wilfert renounced any defense of assumption of the risk. *See* Pl.'s Motion at 13-14, ECF No. 86-2. At the deposition, Ms. Wilfert was asked "if there's any contention that Ms. Bradley assumed any risk after she voiced her complaints to her team trainers and physicians," to which she responded: "[the NCAA has] not made any contention. We don't have any firsthand knowledge." *Id*. Plaintiff's argument is a red herring as the NCAA cannot take a position on events it was not made aware of regarding a situation over which it has no control.

her alleged injury until after AU's October 1, 2011 game against Lehigh. *See* SUMF ¶ 5, 41. By this point, Plaintiff had already taken actions inconsistent with the educational information and direction she received as part of AU's "Concussion Statement," which emphasized the "importance of ***immediately*** reporting symptoms of a head injury/concussion to the [AU] Sports Medicine Staff." SUMF ¶ 38 (emphasis added). Plaintiff was not required to, but elected to participate in the competition on September 25 game, and she waited nearly one week and half to report symptoms following her head injury, both such actions also demonstrated an unreasonable act of indifference toward the educational information and direction she received from AU prior to her season.

Second, Plaintiff participated in AU's October 2, 2011 game against Temple despite her symptoms. *See* SUMF ¶ 42. The Temple game was only a day after Plaintiff reported her injuries to Sarah Thorn and Jenna Earls from AU's training staff on October 1, and several days before Plaintiff met with Dr. Williams on October 5. *See* SUMF ¶¶ 5, 15, 42. On October 3, 2011, Plaintiff sent an email to Ms. Earls, where she noted, among other things, that when she is playing, she feels "dizzy and unfocused," and that it is "hard to concentrate on tactical things like the press." SUMF ¶ 43. Plaintiff's October 3, 2011 email, was a clarification of the way Plaintiff described how she was feeling on October 1, and an explanation of the symptoms she was experiencing "for over a week" prior. SUMF ¶ 44. As such, Plaintiff participated in AU's October 2, 2011 Temple game, despite feeling "dizzy and unfocused," among other things. SUMF ¶¶ 6, 42. Plaintiff could have sat out of her October 2 game, but chose not to.

On June 6, 2018, Dr. Cantu, Plaintiff's own expert, opined that "all of [Ms. Bradley's] subsequent practices and games that she played after [September 23, 2011] probably contributed to the very prolonged post-concussion syndrome that she ultimately sustained." SUMF ¶ 56.

Dr. Cantu specifically noted that the four days of activity between October 1 and October 5, which included Plaintiff's October 2, 2011 game against Temple, "were part of the contribution." SUMF ¶ 57. According to Dr. Cantu, an athlete "should be held out from the time that [a] concussion is recognized," and "the *sooner* it's recognized, the better." SUMF ¶ 53 (emphasis added). Dr. Cantu specifically noted that "continuing to play [field hockey] while symptomatic [] I believe is responsible for her prolonged post-concussion syndrome." SUMF ¶ 59.

Therefore, Ms. Bradley's delay in reporting her alleged injury, and her decision to continue to play immediately after reporting her injury to the AU staff – and prior to seeing Dr. Williams, undoubtedly contributed to the impact of her alleged concussion. Although Plaintiff claims that she "fully and truthfully" reported her symptoms to AU's personnel, she nevertheless did *not* report it "immediately." Pl.'s Motion at 16, ECF No. 86-2. Instead, Ms. Bradley waited over a week from the day she sustained her injury, continued to play in additional games, and only thereafter, reported her symptoms to AU. *See* SUMF ¶¶ 3-4, 5-6. Given the seriousness of Ms. Bradley's purported head injury, Plaintiff failed to exercise reasonable care by not only wrongly deciding to wait over a week to report her symptoms and seek medical care from AU, but also in her decision to immediately play in a game while symptomatic, just a day after reporting her alleged injury.

Finally, on October 20, 2011, Plaintiff visited Dr. Michael Morris, an Ear, Nose, and Throat specialist, who diagnosed Plaintiff with a brain virus and vertigo. *See* SUMF ¶¶ 48-49; *see* Pl.'s Motion at 10, ECF No. 86-2. After Dr. Morris's diagnosis, Plaintiff continued to participate in field hockey practices and games, sitting out only intermittently. *See* SUMF ¶¶ 51. From October 21, 2011 to November 4, 2011, Ms. Bradley continued to play in various games, three of which she played as a starter, including games against Bucknell, Georgetown, and Lafayette. *See* SUMF ¶¶

18-19, 21-22. Following Dr. Morris's diagnosis, Plaintiff could have elected to forego participation and any additional risk. She did not.

Just as Plaintiff argues in her Motion that "had that concussion been treated appropriately, the symptoms more likely than not would have resolved," Pl.'s Motion at 11, ECF No. 86-2, the same can be said about her decision to continue playing rather than sitting out for a few games. Indeed, Plaintiff's symptoms may have resolved had she chosen to rest following her initial alleged injury, but we cannot know because she chose, instead, to play.

Based on these facts, Plaintiff cannot demonstrate that there are no disputed material facts concerning how her failure to exercise reasonable care contributed to her alleged injuries. Moreover, the NCAA has established sufficient facts to show that Plaintiff's actions were not only unreasonable, but also contributed to her injuries.

C. Plaintiff Failed to Mitigate Her Damages

"Mitigation requires a party to take reasonable steps after it has been injured to prevent further damage from occurring." *Adenariwo v. FMC*, 808 F.3d 74, 80 (D.C. Cir. 2015). As noted above, *supra* pp. 17-20, Plaintiff did not take reasonable steps to mitigate her damages after her alleged injury on September 23, 2011. Plaintiff failed to mitigate her damages when she elected to ignore the educational information and direction provided by AU and decided, instead, to: (1) wait to report her symptoms to any AU athletic trainers or staff until over a week after her alleged head injury; (2) play in a field hockey game only a day after reporting her alleged injury, despite being symptomatic; and (3) continue to participate in multiple field hockey games after she was diagnosed with a brain virus and vertigo by Dr. Morris. *Supra* at pp. 16-18. According to Dr. Cantu, Ms. Bradley's decision to attend practices and play in games after her alleged injury, and prior to reporting her injury to the AU staff, likely contributed to the "very prolonged post-concussion syndrome that she ultimately sustained." SUMF ¶ 56.

Therefore, it is evident that Plaintiff failed to mitigate her damages. Plaintiff had multiple opportunities to limit and positively impact the outcome of her injury, but at each juncture, decided not to. Ms. Bradley could have immediately reported her injury to AU's medical staff on September 23, 2011. She did not. Ms. Bradley could have sat out of her October 2, 2011 game against Temple. She did not. Ms. Bradley could have decided to forego participation in games after her brain virus and vertigo diagnosis on October 20, 2011. She did not.

At each juncture, Ms. Bradley chose *not* to mitigate her damages. As a result, Plaintiff cannot show that there is no dispute concerning whether she mitigated her damages. Moreover, the NCAA has established sufficient facts to show that Plaintiff failed to do so.

CONCLUSION

Plaintiff's Motion for Summary Judgment Pertaining to Defendants' Affirmative Defenses fails to satisfy the burden required of a party moving for summary judgment. For this reason, and the reasons discussed above, the NCAA requests that the Court deny Plaintiff's Motion, in its entirety.

Additionally, because Plaintiff has made clear that this is a "quintessential failure to *diagnose* case," the NCAA respectfully requests that the Court grant the NCAA's January 16, 2019 Motion for Summary Judgment Regarding Negligence, seeking to dismiss Plaintiff's negligence claim against the NCAA, *with prejudice*. *See* ECF No. 87.

Respectfully submitted,

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Dated: February 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, I filed Defendant National Collegiate Athletic Association's Opposition to Plaintiff's Motion for Summary Judgment Pertaining to Defendants' Affirmative Defenses, and accompanying documents, using the CM/ECF system, which caused a copy to be served by email on all counsel of record, including:

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